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IN THE  
**SUPREME COURT OF THE  
UNITED STATES**

October Term, 1944.

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**No. 538**  
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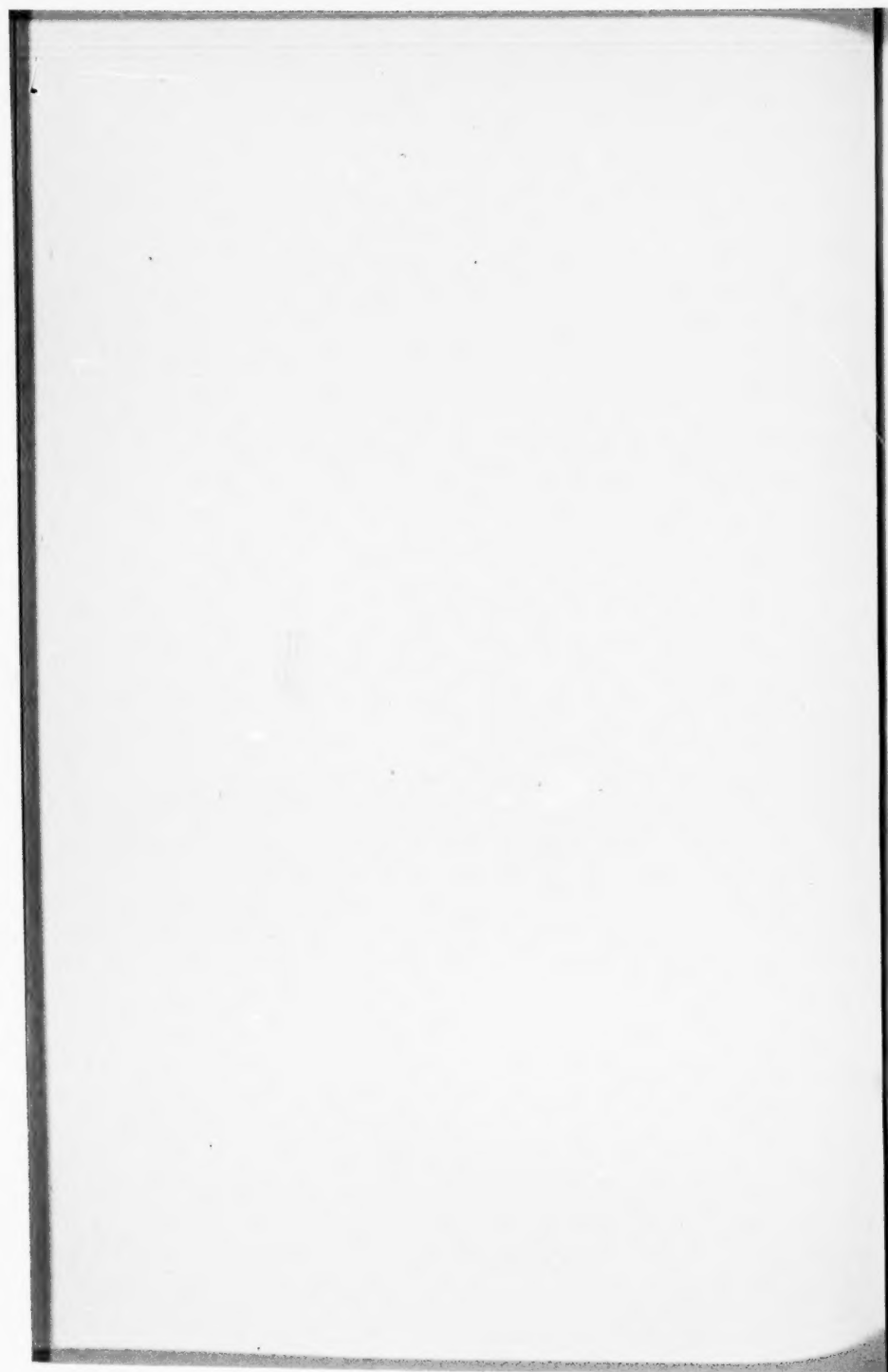
MONTGOMERY WARD & CO., INCORPORATED,  
*Petitioner,*

v.

NATIONAL WAR LABOR BOARD, ET AL.,  
*Respondents.*

\_\_\_\_\_  
**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA AND BRIEF  
IN SUPPORT THEREOF.**

\_\_\_\_\_  
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STUART S. BALL,  
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*Attorneys for Petitioner.*



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**No.**

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MONTGOMERY WARD & CO., INCORPORATED,  
*Petitioner,*

v.

NATIONAL WAR LABOR BOARD, ET AL.,  
*Respondents.*

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**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE DISTRICT OF COLUMBIA.**

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*To the Honorable the Chief Justice and the Associate  
Justices of the Supreme Court of the United States:*

The Petitioner, Montgomery Ward & Co., Incorporated, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered on July 19, 1944, reversing an order of the District Court of the United States for the District of Columbia dated June 21, 1944.

### STATEMENT OF THE MATTER INVOLVED.

On October 20, 1943, the National War Labor Board, acting (R. 67) under Section 7 of the War Labor Disputes Act of June 25, 1943 (57 St. 166; 50 U. S. C. A., App., Sec. 1507, hereafter referred to as "the Act"), issued an order against the Petitioner (R. 67-70), prescribing terms and conditions to govern the relations between Petitioner and a labor union representing certain of its employees in six retail stores operated by Petitioner (R. 3, 7).

On October 5, 1943, Petitioner filed its complaint (R. 1-18) against the members of the National War Labor Board and against Fred M. Vinson, Economic Stabilization Director, and on June 15, 1944, filed a supplemental complaint (R. 97-98). Petitioner charged that the Board had acted in excess of its statutory jurisdiction (R. 9), had denied Petitioner a fair hearing and due process of law as required by the Act and by the Fifth Amendment to the Constitution, (R. 9-10), and had violated the restrictions and standards imposed by the Act (R. 10-13).

Petitioner further alleged:

1. that the Respondents had threatened to enforce the challenged order or cause it to be enforced (R. 13);
2. that the Respondent members of the War Labor Board either had reported or were about to report Petitioner's non-compliance to Respondent Vinson (R. 14);
3. that Respondent Vinson, under the terms of Executive Order No. 9370, was required to, and would, unless restrained, impose sanctions upon Petitioner to enforce compliance with the challenged order;



4. that the Respondents, acting in concert, had caused the forcible seizure of property of Petitioner for the purpose of enforcing another Board order and were threatening and would cause, unless enjoined, the forcible seizure of Petitioner's property to compel compliance with the challenged order (R. 97-98); and
5. that irreparable injury (described with particularity) would result from enforced acceptance of the challenged order (R. 8-9), or from the imposition of sanctions by Vinson (R. 15-16), or from seizure of Petitioner's property and business (R. 98).

Petitioner prayed for an injunction restraining the taking of action intended to compel compliance with the challenged order.

Petitioner also alleged:

1. that the Respondents were claiming the challenged order "is legal and valid" (R. 13);
2. that the Respondent members of the Board were claiming "that the orders of the Board including the order in the present case are enforceable, and that such orders may be enforced by the seizure of . . . property" (R. 97);
3. that the President of the United States had written Respondent Davis in conjunction with the promulgation of Executive Order 9370 (R. 14), asserting that "enforcement of these orders" had been left "to executive action", that "when an employer refuses to comply, his plant may be seized", and that by Executive order 9370 he was "requesting [Respondent Vinson] to direct the application of any and all available sanctions . . . in cases of non-compliance" (R. 79).

Plaintiff prayed for a declaratory judgment under Title 28, U. S. C., Sec. 400 (Judicial Code Sec. 274 (d) ) (R. 2), adjudging the challenged order "illegal, void, and of no effect", declaring the Respondents to be without authority to impose sanctions for non-compliance, and, generally, adjudging and declaring the rights of the parties to the controversy (R. 17).

On January 21, 1944, Respondents moved to dismiss and for summary judgment (R. 84-85), submitting affidavits by Respondents Vinson (R. 86) and Garrison, (R. 87), which asserted:

1. that Petitioner's non-compliance had not yet been reported to Vinson (R. 86, 87);
  2. that Vinson had neither acted nor "threatened to take action to effectuate compliance", nor had decided what action, if any, he would take (R. 86);
  3. that the Respondent members of the Board had neither acted nor "threatened to take action to enforce such directive order" (R. 87);
- and
4. that the Board had "no power to enforce such directive order" (R. 87).

Counter-affidavits filed by Petitioner set forth:

1. that Respondent Garrison had publicly stated that Board members had been, while the instant litigation was pending, "hesitant \* \* \* to attempt to refer the cases to the President, or anything of that sort" (R. 89);
2. that Respondent Davis had publicly stated that the Board members had "interpreted Section 3 [of the Act, providing for seizure of property] to be broad

enough to cover every order that we are directed by the Act to make which is not complied with" since any other view would "leave orders of the War Labor Board without any statutory means of enforcement" (R. 128-129);

3. that Respondent Davis had publicly stated, speaking of Board orders, that the Board members "have assumed that they were all enforceable" (R. 130);
4. that the Attorney General of the United States had publicly stated that "the President is the man who enforces the order" of the Board (R. 133).

Respondents' motions were denied by the District Court on March 20, 1944 (R. 89-90). This order was reaffirmed on June 15, 1944 (R. 122-123).

On June 19, 1944, the Court of Appeals allowed a special appeal and, on July 19, 1944, reversed the decision below. The opinion of the Court of Appeals (R. 135-139) held that Board orders under the Act are neither enforceable nor reviewable (R. 137), do not create legal rights (R. 138, footnote 6), and are "at most advisory" (R. 136, footnote 1). The opinion further held that the complaint, not stating "the form, substance, time, place, or circumstances of any threat", did not state a case "within the Court's general equitable jurisdiction to review and restrain administrative action" (R. 138), and that on this point the affidavits showed an absence of any genuine issue of material fact (R. 139) and required the granting of a summary judgment.

The opinion nowhere stated reasons for the implied holding that the complaint did not set forth a claim for declaratory as distinct from injunctive relief.

## JURISDICTIONAL STATEMENT.

### a. Statutory provision believed to sustain jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, Chapter 229, 43 Stats. 938 (28 U. S. C., Sec. 347(a) ).

### b. Statute involved.

The case involves the interpretation and application of the War Labor Disputes Act of June 25, 1943, 57 Stats., Chapter 144, Secs. 163-168 (28 U. S. C. A., App., Secs. 1501-1511), and of the Fifth Amendment to the Constitution of the United States. Sections 3 and 7 of the War Labor Act are reprinted in the Appendix to our Petition.

### c. Date of the judgment to be reviewed.

The judgment of the Court of Appeals reversing the order of the District Court was entered July 19, 1944. This Petition for Writ of Certiorari and supporting transcript of record are filed in this Court within three months from July 19, 1944, on *October 2, 1944*

## QUESTIONS PRESENTED.

1. Are orders of the National War Labor Board, issued by virtue of the powers vested in the Board by Section 7 of the War Labor Disputes Act, unenforceable and merely advisory, or do such orders establish rights, fix liabilities, and legally "govern the relations of the parties"?
2. Is a court of equity without power to restrain an administrative body from actions in excess of its jurisdiction, or in violation of the statutory provisions describing its functions, simply because its orders are not enforceable?

3. Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, does a complaint which alleges that action which would cause irreparable injury is "threatened" or "is about to, and will" take place, fail to state a cause of action for injunctive relief because "the complaint does not state the form, substance, time, place, or circumstances of any threat"?
4. In the face of allegations in a complaint for injunctive relief, that action causing irreparable injury is "threatened" or "is about to, and will" take place, are affidavits by two of the moving parties simply stating that they have "neither threatened to take action nor taken action" sufficient to support a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure?
5. Does a complaint which alleges the issuance of a specific administrative order presenting terms and conditions to be observed by the plaintiff and which alleges the assertion of antagonistic claims by the defendants and the plaintiff as to the validity and enforceability of this order, fail to state a claim for a declaratory judgment under Title 28, U. S. C., Sec. 400 (Judicial Code, Sec. 274 (d) ), and under Rule 57 of the Federal Rules of Civil Procedure?

#### **REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.**

1. In holding that orders of the National War Labor Board, issued under Section 7 of the War Labor Disputes Act, are unenforceable and merely advisory, the Court of Appeals has decided an important question relating to the construction of a statute of the United

States which is of vital importance to thousands of employers and labor organizations affected by such orders, but which has not been, but should be, settled by this Court.

2. In holding that the National War Labor Board, although empowered to "conduct a public hearing", to subpoena witnesses and written evidence, to "decide the dispute", and to "provide by order" the "terms and conditions governing the relations between the parties" which "shall be in effect until further order", nevertheless does not have the power to issue legally binding orders, the Court of Appeals has decided a federal question in a way probably in conflict with the following decisions of this Court: *Texas and N. O. R. Co. v. Brotherhood*, 281 U. S. 548; *Virginian Railway Co. v. System Federation No. 40*, 300 U. S. 515; *Shields v. Utah Cent. R. Co.*, 305 U. S. 177; *Stark v. Wickard*, 321 U. S. ...., 64 S. Ct. (Adv. Sheets) 559, 88 L. Ed. (Adv. Sheets) 510.
3. In holding that the National War Labor Board cannot be restrained from exceeding its statutory jurisdiction and from violating the statutory provisions describing its functions, the Court of Appeals has decided a federal question in a way probably in conflict with the decisions of this Court in *Pennsylvania R. Co. v. U. S. Railroad Labor Board*, 261 U. S. 72, and *Pennsylvania System Federation No. 90 v. Pennsylvania Railroad Co.*, 267 U. S. 203.
4. In deciding that Petitioner's complaint does not state a claim for injunctive relief because it "does not state the form, substance, time, place, or circumstances of any threat" of irreparable injury, and because it does

not allege "facts which support" Petitioner's "forecast" that it will be irreparably injured, the Court of Appeals

- (1) has decided an important question as to the equity powers of federal courts in a way probably in conflict with the decisions of this Court in *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S. 65, and of the Tenth Circuit Court of Appeals in *Vaughn v. John C. Winston Co.*, 83 Fed. (2d) 370; and
  - (2) has decided a question arising under Rule 8 (a) (2) of the Federal Rules of Civil Procedure in a way probably in conflict with the decisions of the Third Circuit Court of Appeals in *Continental Collieries, Inc. v. Shober*, 130 Fed. (2d) 631, and of the Eighth Circuit Court of Appeals in *Leimer v. State Mutual Life Assur. Co.*, 108 Fed. (2d) 302, and *Sparks v. England*, 113 Fed. (2d) 579.
5. In holding that affidavits in support of a motion for summary judgment executed by two of the moving parties stating that neither they nor the other defendants have "threatened to take action" are sufficient to show that "there was no genuine issue as to any material fact", the Court of Appeals has decided a question of substance relating to the construction and application of Rule 56 of the Federal Rules of Civil Procedure in a way probably in conflict with the decisions of this Court in *Sartor v. Arkansas Natural Gas Corp.*, 321 U. S. ...., 64 S. Ct. (Adv. Sheets) 724, of the Third Circuit Court of Appeals in *Toebelman v. Missouri-Kansas Pipe Line Co.*, 130 Fed. (2d) 1016, and of the Eighth Circuit Court of Appeals in *Walling v. Fairmont Creamery Co.*, 139 Fed. (2d) 318.

6. In holding that the complaint not only failed to state a claim for injunction but also failed to state a claim for a declaratory judgment, despite allegations of antagonistic assertions as to the rights of the parties, the Court of Appeals has decided an important question arising under the Declaratory Judgment Act of 1934 (Tit. 28, U. S. C. Sec. 400, Judicial Code, Sec. 274(d)) in a way probably in conflict with the decision of this Court in *Aetna Life Insurance Co. v. Haworth*, 300 U. S. 227, and with the decision of the Fifth Circuit Court of Appeals in *Gully v. Interstate Natural Gas Co.*, 82 Fed. (2d) 145.

### PRAYER.

WHEREFORE, your Petitioner prays that a Writ of Certiorari issue under the seal of this Court, directed to the United States Court of Appeals for the District of Columbia, commanding that Court to certify and send to this Court a full and complete transcript of the record and of all proceedings before it in the case numbered and entitled on its docket Number 8732, "*National War Labor Board, et al., Appellants v. Montgomery Ward & Co., Incorporated, Appellee*", to the end that such cause may be reviewed and determined by this Court as provided by law.

MONTGOMERY WARD & Co.,  
INCORPORATED,  
*Petitioner,*

By HENRY F. BUTLER,  
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